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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. ~~1290~~ 124

NORVEL H. LILLY,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

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GRAND TRUNK WESTERN RAILROAD COMPANY,
A CORPORATION,

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The petition of Norvel H. Lilly respectfully shows to this Honorable Court:

I.

Summary Statement of Matter Involved.

This action under the Federal Employers' Liability Act and the Safety Appliance Act arose out of an accident wherein petitioner, a brakeman, sustained personal injuries when he fell from the tender of a locomotive as he

was pulling a water spout over the manhole by means of a long pole, preparatory to filling the tank with water. The accident occurred on February 6th, 1937, at Ferndale, Michigan. The parties were engaged in interstate commerce.

A general verdict of $32,500.00 was returned by the jury and sustained by the trial court (R. 10-11, 171)[1], but upon appeal by respondent, the Appellate Court of Illinois, First District, ordered and directed judgment in favor of respondent, notwithstanding the verdict, and this judgment was, in effect, affirmed by the Supreme Court of Illinois by denying petitioner's request for leave to appeal (R. 226), making the judgment of the Appellate Court of Illinois final.

The Illinois courts refused to apply the provisions of the Safety Appliance Act that it shall be unlawful to use any tender unless all its parts are in proper condition and safe to operate without unnecessary peril (45 USCA 23) and further refused to apply Rule 153 of the Interstate Commerce Commission that the top of the tender behind the fuel space should be kept clean and means provided to carry off waste water.

It appeared without dispute that petitioner was caused to fall to the ground when the pole and its hook slipped on the water spout and his feet simultaneously slipped on ice on the top of the tender.

Opinion of the Court Below.

The opinion in the Appellate Court of Illinois, First District, is reported in *Lilly* v. *Grand Trunk Western Railway Company*, 312 Ill. App. 73, 37 N. E. (2) 888. Copy of the opinion, Rec. 226 *et seq.*

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[1]R. refers to Transcript of Record.

The Pleadings.

Insofar as presently material, the complaint charged general negligence with respect to the presence of the ice on the tender (R. 4, 5) and, further, alleged a violation of the Safety Appliance Act in two separate and specific respects:

D. that by reason of ice and other slippery materials the tender was in an improper condition and was unsafe to operate in the service without unnecessary peril to life and limb (R. 5);

E. that by reason of a crack or hole which permitted leakage, the tender was in an improper condition and was unsafe to operate in the service without unnecessary peril to life and limb (R. 8, 9).

Respondent denied all the above charges and pleaded assumption of risk and contributory negligence as complete defenses. At its request, a special interrogatory was submitted to the jury (R. 169) and answered in the negative (R. 10), inquiring as to whether there was any leak near the manhole collar. The Appellate Court accorded a finality to the jury's answer which it was unwilling to give the verdict on the other fact issues in the case. For present purposes only, we will assume, without conceding, that the answer to the interrogatory eliminates from the case any claim of defect in the tender itself, leaving such questions only as arose from the presence of the ice upon the tender from negligent causes, as a violation of the Safety Appliance Act.

All the ice was behind the fuel space and within the prohibitions of Rule 153 (R. 79—Photos. 109-115).

The special interrogatory related solely to charge "E" above, and the Appellate Court of Illinois ignored and refused to apply the Federal Safety Appliance Act to charge

"D" above. Therefore, the answer to this interrogatory in no wise removed the charge that the Safety Appliance Act had been violated because the tender was unsafe due to ice resulting from the negligence of another servant.

Statement of Case.

Petitioner climbed up the regular ladder at the rear of the tender. There was no ice on the rear of the tender and he did not notice or observe any ice when he immediately climbed on top. The ice was in front of the manhole, toward the engine, and it was not until he got around in front of the manhole, which is about 10 or 12 inches high and about 3 feet long (R. 27, 28), that he noticed the ice (R. 78). It covered an area about six feet square (R. 79). Some of respondent's witnesses characterized it as a little or very little ice (R. 102, 127).

The water spout is pulled over the manhole of the tender by means of a long pole with a hook attached thereto. It was petitioner's duty to fill the tender with water. He found the hook embedded in the ice, where it had frozen, and he had to kick it out and knock the ice off. He then braced himself with his feet astride, reached over for the water spout and started to pull it into position, when the hook slipped on the water spout and his feet slipped on the ice, causing him to lose his balance and fall to the ground (R. 18, 78).

The ice was not deposited on the tender by natural causes (R. 27-28, 32, 100). There had been neither rain nor snow (*Id.*). It was admitted on page 17 of respondent's brief in the Appellate Court that the water spattered onto the deck when employes filled the tank (Appendix p. 34)[1]. Under the rules and practice, while the tank should be loaded full, the water should not be permitted to overflow

[1]Appendix in rear pages of this document.

(R. 34-35, 101, 118, 125-130). There is a controlling device to gauge the flow and to prevent any overflow (R. 35, 130-131), and water will not spill or slop over unless the employe filling the tank is negligent (R. 35, 101, 118, 125, 130-131).

It is the duty of the hostler to fill the tenders with coal and water before they leave the roundhouse (R. 29, 139). This engine left Detroit about 7:00 or 7:15 the morning of the day of the accident (R. 17). The petitioner had not been on the tender since the day before (R. 27).

The time of the accident did not appear, but inasmuch as it took about 40 or 50 minutes to go from the roundhouse to Ferndale (R. 29), where they did some switching (R. 17), it is fair to state that the accident occurred about an hour after the crew left Detroit. No water was put in the tank after leaving the roundhouse (R. 29). It was freezing weather (R. 27, 32).

The fireman who finished the job of filling the tank with water after the accident said it was down about 18 or 20 inches (R. 122). It appears that coal and coal dust will sometimes clog up the water drains on a tender (R. 79).

Jurisdiction of the Court.

The complaint alleged that the presence of ice constituted a violation of the Safety Appliance Act (R. 5) and the trial court submitted the question of safety appliance violation generally to the jury (R. 175-176), which found for petitioner.

The train involved carried interstate commerce (R. 14) and both the trial and appellate courts found that the rights and liabilities of the parties were to be determined by the Federal Statutes. The judgment of the Appellate Court of

Illinois sought to be reviewed was entered November 28, 1941 (R. 202). The Petition for Leave to Appeal to the Supreme Court of Illinois was denied by that court on March 13, 1942 (R. 213), making the judgment of the Appellate Court final. The action arises under the Federal Employers' Liability Act and the Federal Safety Appliance Act, and the jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13th, 1925. Cases believed to sustain jurisdiction are *Chesapeake & O. R. Co.* v. *Mihas*, 280 U. S. 102, and *Chicago G. W. R. Co.* v. *Rambo*, 298 U. S. 99.

The Questions Presented.

The trial court submitted the questions of negligence, contributory negligence, assumption of risk and safety appliance violation to the jury, reading the applicable statutes[1], and the case was submitted in a charge that was fair and impartial and which admittedly expressed correct principles of law (R. 175 to 189). Sustaining the verdict for plaintiff, the trial court held that the answer to the special interrogatory did not negative a violation of the Safety Appliance Act (R. 171) because of the two specific and independent grounds alleged in the complaint (R. 5, 8-9).

The principal questions presented to the Appellate Court and the Supreme Court of Illinois were:

1. whether the evidence was sufficient to prove a violation of the Safety Appliance Act under charge "d" in plaintiff's complaint, which question was wholly ignored by the Courts below;

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[1]The text of the Federal Employers' Liability Act, the Federal Safety Appliance Act, so far as here material, and the pertinent rules of the Interstate Commerce Commission will be found set forth *in extenso* in the appendix, pp. 31 to 33.

2. whether the answer to the special interrogatory was conclusive against a finding that the Safety Appliance Act had been violated;

3. whether the evidence was sufficient to permit a finding of general negligence;

4. whether the amendment to the Federal Employers' Liability Act of August 11th, 1939, abolishing the defense of assumed risk was retroactive, and, if not,

5. whether the evidence justified or required a decision as a matter of law that the petitioner assumed the risk.

All of these questions were decided by the appellate courts of Illinois adversely to the petitioner.

II.

Reasons Relied On for Allowance of Writ.

The appellate courts of Illinois erroneously failed to apply the Federal Safety Appliance Act, and have decided Federal questions of substance in conflict with the decisions of this Court and the Circuit Courts of Appeal, to-wit:

A. In adopting a strict, narrow, erroneous and technical construction of the Safety Appliance Act, contrary to the liberal and humanitarian policy announced by this Court in *St. Louis I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281; *Louisville & N. R. Co.* v. *Layton*, 243 U. S. 617; *Swinson* v. *Chicago, St. P. M. & O. Ry. Co.*, 294 U. S. 529; *Brady* v. *Terminal R. Co.*, 303 U. S. 10.

B. In failing to take judicial notice of Rule 153(a) and (c) of the Interstate Commerce Commission, contrary to *United States* v. *B. & O. Ry. Co.*, 293 U. S.

454; *Caha* v. *U. S.*, 152 U. S. 211; *Jenkins* v. *Collard*, 145 U. S. 546; *Knight* v. *United Land Ass'n.*, 142 U. S. 161; *Thompson* v. *Missouri Pacific R. Co.*, 15 F. (2d) 28.

C. In holding that the defense of assumed risk is a vested right and that, therefore, the amendment to the Federal Employers' Liability Act of August 11th, 1939, was not retroactive, contrary to *Arizona Copper Co.* v. *Hammer*, 250 U. S. 400; *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538; *South Carolina* v. *Gaillard*, 101 U. S. 433; *U. S.* v. *Schooner Peggy*, 1 Cranch 103.

D. In erroneously converting the partial defense of contributory negligence into the complete defense of assumption of risk, contrary to the explicit ruling of this Court in *Schlemmer* v. *Buffalo P. & P. R. Co.*, 205 U. S. 1; *Seaboard Airline Ry. Co.* v. *Horton*, 233 U. S. 492.

E. In disregarding and violating the principle that petitioner was entitled to have the evidence considered and reasonable inferences drawn in support of the verdict and judgment rendered, contrary to *Jacob* v. *City of New York*, 62 S. Ct. 854; *Gunning* v. *Cooley*, 281 U. S. 90; *Elzig* v. *Gudwangen*, 91 F. (2d) 434; *Chicago M. St. P. & P. R. Co.* v. *Linehan*, 66 F. (2) 373; *Kulp* v. *Chicago, St. P., M. & O. Ry. Co.*, 88 F. (2d) 466.

F. In holding as a matter of law that petitioner assumed the risk, contrary to the uniform current of authority in both State and Federal courts, commiting such an issue to the jury where a servant slips on ice, water, oil or other slippery substance, con-

trary to *Bell* v. *Terminal R. Co.*, (Mo.) 18 S. W. (2d) 40; *Missouri Pacific R. Co.* v. *Boyd*, 106 S. W. (2d) 165; *York* v. *C. M. & St. P. R. Co.* (Wis.), 198 N. W. 377; *Melody* v. *Des Moines Union R. Co.*, (Ia.) 141 N. W. 438; *Reams* v. *C. M. & St. P. R. Co.* (Minn.), 231 N. W. 236; *Illinois Central R. Co.* v. *Skinner's Admr.*, (Ky.) 197 S. W. 552; *Missouri Pac. R. Co.* v. *Siratt*, 78 F. (2d) 253; *Northern Pac. Ry.* v. *Berven*, 73 F. (2d) 687; *C. N. O. & T. P. Ry. Co.* v. *Thompson*, 236 F. 1.

It is essential that a Writ be granted in order to determine an important question relating to the construction and interpretation of the Safety Appliance Act and, specifically, whether the doctrine of the case of *Ford* v. *N. Y. & H. R. Co.*, 54 F. (2d) 342, cert. den. 285 U. S. 549, is applicable to a case coming under Rule 153(a) and (c) of the Interstate Commerce Commission. It is the contention of petitioner that where the Interstate Commerce Commission has set up the standard, as in Rule 153(a), the doctrine of the *Ford* case has no application. The Interstate Commerce Commission set up no such standard or requirement as to grab irons and handholds.

PRAYER.

Wherefore, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Appellate Court of Illinois, First District, commanding said court to certify and send to this Court a transcript of the record in the case entitled "Norvel H. Lilly, appellee, *v.* Grand Trunk Western Railway Company, a corporation, appellant, number 40882", including also the proceedings in said Appellate Court, together with the Illinois Supreme Court's denial of petitioner's request for

leave to appeal, to the end that said cause may be reviewed and determined by this Court and the judgment of the lower courts be reversed.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF CASE.

The facts with reference to the origin and history of the case and also with reference to jurisdiction have been sufficiently covered in the petition, and in the interests of brevity will not be here repeated. The issues and the evidence have likewise been discussed in the preceding petition so that the detailed picture need not be repeated. It might be well, however, to review in a little more detail the evidence concerning the proper, customary and careful manner of filling the tank of a tender in order to avoid overflow.

Petitioner testified that it was easy to keep the water from slopping and he had never seen employes let it do so (R. 35). Respondent's evidence was to the same effect: Findley (R. 131) testified that he could regulate the flow so as to get just enough water without overflowing if he handled it right and he usually did; Granger (R. 101) that the rule is that tanks are to be filled so they do not overflow; Holton (R. 118) that there is a regulator so that a fellow can gauge the stream just the way he wants it; and Smith (R. 125) that it is the rule not to let the water go over the top and one could prevent it by handling it right.

In view of the jury's finding that there was no crack or leak in the tender, it is certain that they also found under the general verdict for petitioner that the water accumulated and froze because of a violation of the rule and customary practice referred to above. These two findings are not at all inconsistent. Accepting the answer to the special

interrogatory as final under the decision of the Appellate Court, there is, indeed, no other rational conclusion possible under the evidence.

Specification of Errors to Be Urged.

The Supreme and Appellate Courts of Illinois erred:

1. In holding as a matter of law that there was no violation of the Safety Appliance Act.
2. In holding that the defense of assumed risk was available to respondent.
3. In holding that the evidence was insufficient to warrant a finding that respondent was negligent.
4. In holding that it conclusively appeared as a matter of law that petitioner assumed the risk.

ARGUMENT.

I.

The evidence showed a violation of the Federal Safety Appliance Act.

The Act (45 USCA 23) requires the tender and all its parts and appurtenances to be in proper condition and safe to operate in active service without unnecessary peril to life or limb. The duty is absolute and mandatory and makes the railroad company practically an insurer. As said by Mr. Justice Hughes in *Brady* v. *Terminal R. Assn. of St. Louis*, 303 U. S. 10:

> "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care, however assiduous."

See also to the same effect *Southern R. Co.* v. *Lunsford*, 297 U. S. 398; *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521; *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454; *Lehigh Valley R. Co.* v. *Beltz*, 10 F. (2d) 74, cert. den. 270 U. S. 641.

Under the authority conferred by this Federal Statute, the Interstate Commerce Commission issued Rule 153 which provides:

"TENDERS

"Rule 153. (a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service. * * *

"(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water. * * *."

See Roberts' Federal Liabilities of Carriers, Vol. 2, 2d Ed., Appendix V, pages 2068 and 2069.

This rule was in effect at the time of the accident and under the decisions of this Court it was as controlling as the Act itself, because, as said by Justice Brandeis in *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454:

> "When the rules have not been complied with which were issued by the Commission the engine is unsafe within the meaning of the Boiler Inspection Act."

The rule is well stated in *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521:

> "The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard."

The issue as to whether ice alone constituted a violation of the Act was raised by the pleadings and submitted to the jury (R. 5, 175-176), and in sustaining the verdict under the Act, despite the answer to the special interrogatory, the trial court stated:

> "Now, whether there was a crack or not, yet still the question of the safety appliance could remain in there if the court did feel that it was the duty of the defendant to keep the tender clear so that the man might operate. I don't know about that. It might be" (R. 171).

Both the jury and the lower court upon ample evidence found that the ice was present and due to defendant's negligence, and, therefore, all the facts upon which decision must depend are in the present record.

This particular issue—the charge of violation of the Safety Appliance Act—was presented to the Appellate Court in petitioner's brief and argument originally filed in the Appellate Court, by the following language:

> "Plaintiff made out a case of clear liability—a violation of the Safe Locomotive Act, one of the Federal Safety Appliance Acts. * * * Plaintiff, in his complaint, makes two charges of a violation of this Act. In one charge 'd', the allegation is: '* * * this tender was unsafe because the top where plaintiff was required to work was slippery and covered with ice and other slippery materials * * * and the tender leaked there, and while he was so at work, as above charged, he slipped on this slippery and unsafe condition * * *'". (Appendix p. 34.)

Both the jury and the lower court upon ample evidence found that the ice was present and, therefore, all the facts upon which decision must depend are in the present record. The issue was precisely the same, as far as the evidence and the facts are concerned, whether attention be directed to the issue of negligence generally or under this feature of the Safety Appliance Act. The fact that this controlling rule of the Interstate Commerce Commission was not urged upon the Appellate Court of Illinois until the petition for rehearing is of no significance.

It was therein fully discussed (R. 203 to 209) and was likewise called to the attention of the Supreme Court of Illinois in the Petition for Leave to Appeal (R. 214 to 225). It was the duty of the courts to take judicial notice of this applicable and governing rule of law. The decisions of this Court definitely establishing that duty will be found in Roberts' Federal Liabilities of Carriers, Vol. 2, Sec. 1020, in support of the statement that the courts will take judicial notice of the rules and orders of the Interstate Commerce Com-

mission pursuant to the authority delegated to it in the Safety Appliance Acts. In addition to the cases cited by Roberts, see *Thompson* v. *Mo. Pac. R. Co.*, 15 F. (2d) 28, and also *Goulette's Admr.* v. *Grand Trunk R.*, 93 Vt. 266—107 Atl. 188, where it is held:

> "In actions under the Federal Employers' Liability Act the Courts will take judicial notice of the standards established by orders of the Interstate Commerce Commission pursuant to authority granted by the Safety Appliance Act."

The neglect of the Appellate Court to apply or to take judicial notice of this rule involves no change of theory. The situation is similar to that existing where both counsel and the lower court merely overlook a controlling authority. There is no change to a different or inconsistent theory of a cause of action or defense. It is merely hornbook law that if between two appeals in the lower Federal Courts, this Court decides the question, its decision must be followed; and we are only seeking here a decision in accord with the controlling principles of law heretofore announced by this Court. This case has been tried and presented throughout on the theory that the Safety Appliance Act was violated in not merely the one respect foreclosed by the answer to the special interrogatory, but by the mere presence of the ice itself.

The mere statement of counsel in his closing argument to the jury that a negative answer would put his client out of court is a mere expression of opinion. It binds neither court nor client. It is absurd to suppose that a lawyer could thus change the governing and applicable rules of law. The statement was made in a context which indicates that it could not and should not be accepted with the literal interpretation placed upon it by respondent.

Even had counsel failed to urge the liability of the railroad company under the Safety Appliance Act, yet if the proof shows a violation, it is the duty of the court to take cognizance of it and to enforce the law as held in *Thompson* v. *Hocking Valley R. Co.* (6 Cir.) 45 F. (2d) 155. The court there said that if the appliance was really unsafe and the plaintiff was entitled to recover under the Act, "the shortcomings of counsel ought not to be given fatal effect."

It seems hardly necessary to add that the purpose of the original Act, as well as Rule 153, was to insure the removal of any foreign or extraneous material that might endanger the safety of employes. The words safe and proper are of plain and simple meaning. Rule 153 specifically provides for the removal of waste water. The word "clean" obviously has connotations of safety rather than of purity.

Where there is a violation of the Act, neither contributory negligence (45 USCA 53) nor assumption of risk (45 USCA 54) constitutes a defense, either total or partial.

It was held in *Ford* v. *New York, N. H. & H. R. Co.*, 54 F. (2d) 342, cert. den. 285 U. S. 549, that grease upon a handhold did not constitute a violation of the Safety Appliance Act. In that case the rule of the Interstate Commerce Commission prescribed only the size, dimensions and mechanical construction of the handhold. It did not require that it should be kept clean or free from grease. Here the rule requires that the tender be kept clean and free from waste water. Therefore, the very element which was absent in the *Ford* case is present here and a writ should be issued so that the law may be clarified and so that the *Ford* case and other similar decisions should be properly distinguished and limited.

II.

The amendment abolishing assumption of risk was retroactive.

Reference was recently made in the *Miles* case by Mr. Justice Jackson to the "medieval system" of compensating railroad employes, and one of the relics of this feudal and "backward" system was the ancient and barbarous doctrine of assumption of risk, now happily abolished in all cases. Presumably, when Congress acted to eliminate this defense, it did so with the purpose of promoting justice in all cases to which its power would extend. The cruelty of the defense had been the subject of much comment by judges, sociologists and law writers generally. The action of Congress was remedial; the legislation cannot be otherwise classified; and no good reason appears why the benefit of a wise and humane amendment should be unnecessarily restricted, but on the contrary, it should receive a liberal interpretation to effectuate its object and purpose.

The amendment passed by Congress on August 4th, 1939, and approved by the President August 11th, 1939, amended Section 4 of the Federal Employers' Liability Act, so that it now reads as follows:

> "Section 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where *such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employes of such carrier; and no employe shall be held to have assumed the risks of his employment in any case where* the violation by

> such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe." (The amended part is in italics.)

This amendment became effective while this case was pending on appeal in the Appellate Court (R. 13). The section refers not to accidents or causes of action, but to actions "brought" against common carriers. The language is, "That in any action brought * * *." Brought is in the past tense, and Congress did not limit the section to actions "to be brought", or "to be commenced", nor to "actions arising hereafter", etc.

That retrospective operation was intended by Congress is evidenced by the fact that Section 3 of the Federal Employers' Liability Act relating to contributory negligence provides, "In all actions hereafter brought * * *".

In *Hine* v. *Belden*, 29 Conn. 384, it was held that the use of "brought", "implies past time, and includes prosecutions pending, as well as those thereafter to be brought."

The statute is a remedial one, and under familiar principles of liberal construction should be given retrospective operation. Lewis Sutherland, Statutory Construction, Volume 2, page 1209, where it is said; referring to such statutes, "They will be freely construed to have a retrospective operation whenever such seems to have been the intention of the legislature". See, also, Cooley, Principles of Constitutional Law, 3d Ed., pages 360-361, where the author states:

> "The citizen has no vested right to any particular remedy, and the state may therefore take away at discretion those it provides and substitute others which shall apply to wrongs already committed as well as those which may be thereafter committed."

This Court said in *Arizona Copper Co.* v. *Hammer*, 250 U. S. 400:

> "No person has a vested right, entitling him to have unchanged the existing rules of law concerning an employer's responsibility for personal injury or death of an employe."

United States v. *Schooner Peggy*, 1 Cranch 103.
South Carolina v. *Gaillard*, 101 U. S. 433.
Ewell v. *Daggs*, 108 U. S. 143.
Railroad v. *Grant*, 98 U. S. 398.
Campbell v. *Holt*, 115 U. S. 620.
Arizona Copper Co. v. *Hammer*, 250 U. S. 400.
Carpenter v. *Wabash R. Co.*, 309 U. S. 23.
Vandenbark v. *Owens-Illinois Glass Co.*, 311 U. S. 538.

In the opinion of Justice Reed in the *Vandenbark* case, *supra*, the language of Chief Justice Marshall was quoted with approval that:

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

The State authorities holding that remedial legislation of this kind should be given a retrospective operation are too numerous to cite in this brief.

It appears, therefore, that the opinion below is erroneous in stating that the defense of assumed risk is a vested right (R. 202) and was rendered by the court under a misapprehension as to the true rule established by the decisions of this Court.

III.

The evidence was ample to warrant a finding that respondent was negligent.

The courts below held that there was no evidence of negligence because, first, the origin of the water and ice did not appear, and, secondly, respondent had no notice of its existence.

In truth and in fact, it was established to the point of demonstration that the water and ice accumulated because the employe who previously filled the tank had negligently permitted an overflow (R. 27-28, 34-35, 100-101, 118, 125, 130-131). It is absurd to suppose that some trespasser, unobserved by the crew, stole his way to the top of the tender and thence to the area between the manhole cover and the fuel space and spread a pail of water over a six foot area at some unknown time between the departure from the roundhouse at Detroit and the arrival in the yards or during the switching operations in the yards at Ferndale. Nor is such speculation to find a defense permissible.

As said in *Kulp* v. *Chicago, St. P., M. & O. Ry. Co.*, 88 F. (2d) 466, cert. den. 201 U. S. 700:

> "In the absence of direct testimony, the simple suggestion of theories by the defense does not reduce the jury to mere speculation, and disqualify it from determining the cause of the injury complained of."

More precisely in point is *Terminal R. Ass'n. of St. Louis* v. *Farris*, 69 F. (2d) 779, 785:

> "The fact that hypotheses incompatible with the liability of the appellant may be conjectured or imag-

ined, when such are not based on any testimony in the case, affords no reason to reverse a verdict and judgment which is supported by the testimony."

While the Appellate Court indicated in its opinion that the source or the origin of the ice was unknown, it was no mystery to the respondent when it prepared its brief in such Court, because on page 17 it was there stated:

> "If there was any ice on the deck of the tender it resulted from water unavoidably spattering onto the deck of the tender from the force of the water as the water is put in the tender by the crew." (Appendix p. 34.)

The notion that respondent did not have notice of the presence of the ice is equally a perversion of legal principles. As said in *Sears, Roebuck & Co.* v. *Peterson*, 76 F. (2d) 243, it is universally held that where the condition of the premises is "due to the direct act of the defendant, or of persons whose acts are constructively his own, no notice need be shown, but is necessarily implied". In the opinion a number of authorities are cited. We refer only to *Grzboski* v. *Bernheimer-Leader Stores*, 156 Md. 146, 143 At. 706, where a customer slipped on an orange peel in the aisle, and it was said:

> "It would still be possible, and consistent with such finding, that the orange peel might have been dropped on the pile by a customer subsequently, without the knowledge of the employe who swept it up, but it seems to this court that the probability would be that any such thing on or in a small gathering of rubbish at that one spot would itself have been gathered or swept there, a probability so strong that practical men would regularly take it as establishing the fact. And such a probability would be proper basis for a finding of fact."

The Circuit Court of Appeals in the *Peterson* case, *supra*, said that under such circumstances, "neither should the court indulge in mere speculation as to a possible defense unsupported by any proven facts."

It is only where the facts are such that all reasonable men must draw the same conclusion that the question of negligence becomes one of law for the court, and where fair minded men would honestly draw different conclusions, the question is one of fact to be settled by the jury. *Gunning* v. *Cooley*, 281 U. S. 90. As said in *Railroad Co.* v. *Stout*, 17 Wallace 657, 663, "It is this class of cases and those akin to it that the law commits to the decision of a jury."

IV.

Contributory negligence and assumption of risk were properly submitted to the jury.

The petitioner, although aware of the ice, braced himself with his feet astride (R. 18, 78). While there is always danger of slipping on ice, yet it is not absolutely certain that one will do so; it can be avoided by the exercise of that degree of care commensurate with the risk. The failure to exercise such care is contributory negligence and not assumption of risk.

Here it was not solely the fact that petitioner slipped upon the ice that caused the accident; there was also the element that the pole and hook slipped on the water spout; both were causative factors (R. 18, 78). There is no evidence that the hook was certain to slip or even likely to slip. There was no evidence that petitioner knew that the hook would slip. There was no evidence that he did not justifiably believe that the hook would remain upon the water spout and that with his feet properly braced he could succeed safely in filling the tender with water.

Assumption of risk is not a favored doctrine but is artificial and harsh; it is an affirmative defense and the burden to establish it is upon the master.

Kanawaha & M. R. Co. v. *Kerse*, 239 U. S. 576.
Texas & Pac. R. Co. v. *Archibald*, 170 U. S. 665.
C., R. I. & P. Ry. Co. v. *Ward*, 252 U. S. 18.
Chesapeake & O. R. Co. v. *Proffit*, 241 U. S. 462.
Schlemmer v. *Buffalo P. & P. R. Co.*, 205 U. S. 1.

There are two kinds of risks: 1, Ordinary risks, and, 2, extraordinary risks arising from negligence. Those in the latter classification are usually not assumed, and the courts are reluctant to sustain this defense when risks in the second category, due to negligence, are involved. Of particular interest here is the *Schlemmer* case, *supra*, where Justice Holmes indicated that the distinction between contributory negligence and assumption of risk should be carefully observed. He called attention to the fact that men who work with their hands do not have the freedom and equality of position assumed by *laissez faire*, that the doctrine of contract was rather shadowy as applied to this defense, and that distinguishing it from contributory negligence

> "* * * the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

Under the Federal Employers' Liability Act prior to the 1939 amendment contributory negligence merely diminished damages but assumption of risk was a complete defense. Section 3 (45 USCA 53) provides that, "Contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

In *Cross* v. *C. B. & Q. R. Co.*, 191 Mo. App. 202, 186 S. W. 1130, following the *Horton* and the *Schlemmer* cases, the Missouri court said great care should be exercised "lest the plaintiff's rights be sacrificed entirely by calling his act assumption of risk, when, strictly speaking, it is only contributory negligence, which does not defeat his cause of action entirely but merely reduces his damages."

It is impossible to reconcile the decision below with that of this Court in *Keys* v. *Pennsylvania R. Co.*, 308 U. S. 529, reversing the case of *Keys* v. *Pennsylvania R. Co.*, 104 F. (2d) 663, and holding that assumption of risk was for the jury. We earnestly request the members of this Court to read the opinion which was set aside and disapproved by the reversal in the *Keys* case. It would be a strange system of jurisprudence which would award a jury trial in that case and deny one here.

It is one thing to hold that where there is no negligence at all and where the ice was formed from natural causes, as in *Mo. Pac. R. Co.* v. *Aeby*, 275 U. S. 426, and *Hatton* v. *New York, N. H. & H. R. Co.*, 261 F. 667, there can be no recovery. In the *Aeby* case this Court said that anent negligence, "we need not consider its contentions in respect of assumption of risk * * * ". Holding as here that petitioner assumed the risk from ice negligently created by affirmative conduct is something else.

The other cases cited in the opinion below, namely, the *Horton*, *Jacobs* and *Boldt* cases, all concerned the propriety

of requested instructions, and in none of them was it held that assumption of risk appeared as a matter of law. In two of them the verdict of the jury was actually sustained and in the other case a reversal resulted from erroneous instructions. None is authority here.

The cases relied on by respondent and cited by the court fall in one of three classes:

1. Where no negligence was shown.
2. Where the condition was of a permanent nature and resulted from natural causes.
3. Where the danger of injury was certain and immediate and practically unavoidable.

The lower court gratuitously assumed that petitioner could have made the tender safe with sand or ashes. Apparently it did not know that all of the sanders operate simultaneously, that while sand is flowing from one sander onto a shovel, it would be flowing from the others on the rails, and that this sand is specially prepared and specially dried and is of a character so that engineers are reluctant to permit its use for other purposes. Apparently the court did not know that whether ashes are available depends upon the condition of the fire, and that it is a difficult task to obtain ashes with the fireman's shovel. In fact it is a dangerous proceeding to carry ashes mixed with hot coals to the top of the tender by either climbing up the ladder or climbing over the coal and it is an operation that requires the cooperation of two or more crew members.

We shall make no attempt to overwhelm this Court with the citation of the very plethora of State and Federal authorities holding that this issue in the case at bar was properly for the jury. As illustrative we select at random

Bell v. *Terminal R. Co.* (Mo.) 18 S. W. (2d) 40, where a fireman slipped on the icy steps of his engine. He and his engineer had been using them for hours and in answer to the contention that a verdict should have been directed, it was said, "We don't think so, for the evidence tends to show that immediate injury was not threatened by using the icy steps."

The respondent does not claim that petitioner should have selected any such course. It is obvious that the members of the Appellate Court themselves were utterly unfamiliar with either procedure, and had any of them ever attempted to obtain ashes from the firebox of a locomotive, the juridical result below might have been different. At any rate, the failure of petitioner to select the safer of two courses would be contributory negligence and not assumption of risk. This is thoroughly established.

STATE CASES.

Virginia-Portland Cement Co. v. *Swisher's Admr.*, 94 S. E. 159.

St. Louis I. N. & S. R. Co. v. *Yates*, 165 S. W. 282, 286.

Houlihan v. *Conn. River Company*, 42 N. E. 108.

Sinclair Oil & Gas Co. v. *Langley*, 293 S. W. 1015.

Headrick v. *H. D. Williams Cooperage Co.*, 134 S. W. 957.

FEDERAL CASES.

Thomson v. *Boles*, 123 F. (2d) 487.

Terminal R. Ass'n. of St. Louis v. *Farris*, 69 F. (2d) 779.

Norfolk & W. R. Co. v. *Riggs*, 98 F. (2d) 612.

Rocco v. *Lehigh Valley R. Co.*, 228 U. S. 275.

In *Thomson* v. *Boles, supra,* the authorities are cited and it is said:

> "Moreover, the departure, if any, from the usual and customary practice would not be a complete defense, but would merely constitute contributory negligence."

The applicable rule is well stated in White on Personal Injuries on Railroads, Vol. 1, page 377, that knowledge of the defect and failure to complain will not always work an assumption of risk "for the employe may have had reasonable ground to believe by the exercise of due care on his part that he could use the defective appliance without a resulting injury."

The following facts in the case at bar fully justified the trial court in submitting the case to the jury:

1. The condition was not *necessarily* dangerous nor certain to result in injury.
2. Petitioner's knowledge was so closely connected in point of time and action that there was no appreciable interval.
3. Petitioner had no opportunity to object to the master.
4. There was no evidence that petitioner freely and voluntarily consented to the condition.
5. The petitioner was under a duty not to delay the train and hence not to abandon that one, single task.
6. The unexpected release of the hook from the water spout acted in conjunction with the ice under his feet to cause the accident.

CONCLUSION.

In seeking merely a hearing on the merits in this case, petitioner believes that the language of Mr. Justice Murphy in *Jacob* v. *City of New York*, 62 S. Ct. 854, which is the latest decision of this tribunal dealing with assumption of risk, cannot be too strongly emphasized, as follows:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

Respectfully submitted,

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APPENDIX

APPENDIX.

Federal Employers' Liability Act.

Act of April 22, 1908, c. 149, Sections 1, 3; 35 Stat. 65-66 (45 USCA para. 51, 53).

1. Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

* * *

3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by

such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Federal Safety Appliance Act, usually known as Boiler Inspection Act.

(45 USCA, Section 23; June 7, 1924, c. 355, No. 2, 43 Stat. 659.)

Use of unsafe locomotives and appurtenances unlawful; inspection and tests. It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Rules of the Interstate Commerce Commission.

Tender...

152. Tender frames. (a) Tender frames shall be maintained in a safe and suitable condition for service.

(b) The difference in height between the deck on the tender and the cab floor or deck on the locomotive shall not exceed 1½ inches.

(c) The minimum width of the gangway between locomotive and tender, while standing on straight track, shall be 16 inches.

153. Feed water tanks. (a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service. Suitable screens must be provided for tank wells or tank hose.

(b) Not less frequently than once each month the interior of the tank shall be inspected, and cleaned if necessary.

(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water. Suitable covers shall be provided for filling holes.

(See official pamphlet of Interstate Commerce Commission, Bureau of Locomotive Inspection, orders dated October 11, 1915, to February 21, 1929, inclusive.)

(See also Roberts Fed. Liab. of Car., Vol. II, Appendix V, Pgs. 2068 and 2069.)

SECTION 4 AS AMENDED AUGUST 11, 1939.

(45 USCA 54, 1941 Cumulative Annual Pocket Part.)

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Exhibit A.

(Appellant's Appellate Court Brief.)

Respondent said in its Appellate Court brief (Exhibit A, p. 17):

> "If there was any ice on the deck of the tender it resulted from water unavoidably spattering onto the deck of the tender from the force of the water as the water is put in the tender by the crew."

Exhibit B.

(Appellee's Appellate Court Brief.)

On Page 9 of the argument Petitioner said:

> "Plaintiff made out a case of clear liability—a violation of the Safe Locomotive Act, one of the Federal Safety Appliance Acts. * * *
>
> "Plaintiff, in his complaint, makes two charges of a violation of this act. In one charge 'd,' the allegation is:
>
> "* * * this tender was unsafe because the top where plaintiff was required to work was slippery and covered with ice and other slippery materials * * * and the tender leaked there, and while he was so at work, as above charged, he slipped on this slippery and unsafe condition * * *.'"